

Saturday, 25 May, 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

A Motion by HIRANUMA, Kiichiro;
MATSUOKA, Yosuke; SHIGEMITSU, Mamoru;
TOGO, Shigenori and UMEZU, Yoshijiro
for Bill of Particulars;

A Motion by all the Accused for
Bill of Particulars; and

Other Motions.

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Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth of
Australia.

Reported by:
Julian Wolf.

A P P E A R A N C E S

For the Prosecution Section:

HSIANG CHE-CHUN, Judge, Associate Counsel,
acting on behalf of the Republic of
China;

MR. A. S. COMYNS CARR, Associate Counsel,
acting on behalf of the United Kingdom
of Great Britain and Northern Ireland;

MR. S. A. GOLUNSKY, Associate Counsel,
acting on behalf of the Union of
Soviet Socialist Republics;

A. J. MANSFIELD, Justice, Associate Counsel,
acting on behalf of the Commonwealth of
Australia;

H. G. NOLAN, Brigadier, Associate Counsel,
acting on behalf of Canada;

MR. C. HIGGINS, Assistant to Chief of Counsel,
acting on behalf of the United States of
America;

MR. FRANK S. TAVENNER, JR.; and

MR. EUGENE D. WILLIAMS.

For the Defense Section:

BEVERLY M. COLEMAN, CAPTAIN, USNR,
Chief of Counsel;

FRANKLIN WARREN, LIEUTENANT COLONEL, AC AUS,
Counsel for Accused MATSUOKA, Yosuke;

BEN BRUCE BLAKENEY, MAJOR, AC AUS,
Counsel for Accused UMEZU, Yoshijiro;

SAMUEL J. KLEIMAN, CAPTAIN, AC AUS,
and USAMI, Rukuro, Counsel for Accused
HIRANUMA, Kiichiro;

GEORGE A. FURNESS, CAPTAIN, AC AUS,
Counsel for Accused SHIGEMITSU, Mamoru
and MUTO, Akira;

MR. GEORGE YAMAOKA, Counsel for Accused
TOGO, Shigenori; and

KIYOSE, ICHIRO, Counsel for Accused
TOJO, Hideki and SATO, Kenryo.

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Counsel for Accused SHIGEMITSU, Mamoru
and MUTO, Akira;

MR. GEORGE YAMAOKA, Counsel for Accused
TOGO, Shigenori; and

KIYOSE, ICHIRO, Counsel for Accused
TOJO, Hideki and SATO, Kenryo.

For the Office of the General Secretary, IMTFC:

VERN WALBRIDGE, Colonel, CAC,
General Secretary;

G. W. HANLEY, Lieutenant Colonel, AC,
Executive Officer;

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat;

C. WALTER BOWMAN,
Clerk of the Court; and

CHARLES A. MANTZ,
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The proceedings were begun at 1000.

THE PRESIDENT: This application was adjourned to be conferred upon. Perhaps you will be able to tell me what action was taken.

MR. COMYNS CARR: I am afraid, up to the present, Sir William, nothing has resulted from it because it was intimated that other motions besides these were about to be filed, and it was not possible to deal with any matter by agreement until they could be dealt with as a whole.

We are aware of certain motions that have been filed and served upon us within the due date. This morning we were handed another of which we were not aware at all, and I do not know exactly when that was filed. They are not numbered, and it is rather difficult to identify them. Perhaps it would be convenient, before discussing this matter, to get quite clear what motions there are in existence at the present time.

THE PRESIDENT: Yes.

CAPTAIN KLEIMAN: Captain Coleman has the motions that we have had filed yesterday, sir.

MR. JUSTICE MANSFIELD: First, there is the motion for particulars.

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CAPTAIN KLEIMAN: I want to tell your Honor

about what occurred with respect to the motion for particulars before Captain Coleman speaks.

CAPTAIN COLEMAN: The motions filed yesterday were a motion for specific findings of fact, motion on order concerning time of making opening statement, motion upon an order to be made parties, motion for a continuance, motion to strike counts in Indictment, and motion to extend time for filing motions.

THE PRESIDENT: Yes.

MR. COMYNS CARR: Then, in addition, I do not know -- I would rather like to know the order in which they appear in your list. We have filed a motion for directions, particularly in regard to asking the Tribunal to take judicial notice of certain facts and certain documents, and --

THE PRESIDENT: I propose to take the motions in the order in which they have been filed unless there are two motions bearing the same name together. There is a motion for continuance --

MR. COMYNS CARR: Can the Court Secretariat inform us what motions were filed in time in accordance with the Court's order and in what order they were filed?

THE CLERK OF THE COURT: Yes. The papers are before Sir William and each of the parties. There is a pencil number on the left hand corner, and that indicates the order in which they were filed.

THE PRESIDENT: Yes. This is the order: Motion for bill of particulars, number 20; 36 is your notice of motion that certain documents be judicially noticed; 37 is the motion for bill of particulars in behalf of all the defendants; 39 is a motion for the continuance; 40 is a motion for order concerning the time of making opening statements -- well, I will deal with that at the same time I deal with your application; 41 is a motion for specific findings of fact. Specific findings are not indicated --

MR. COMYNS CARR: I do not understand that point.

THE PRESIDENT: (continuing) and there is a motion for an order to be made parties.

MR. TAVENNER: Parties to previous motions.

CAPTAIN KLEIMAN: What we did desire was to try to expedite this trial by joining all the defendants in a motion for that, which we had made in the past. We made a motion to attack the jurisdiction of the Tribunal, a motion saying that there wasn't any international law under which any of the counts could be a crime. Rather than make a separate motion to that effect, we joined all the defendants by signature of their Japanese counsel.

THE PRESIDENT: Will that particular motion be definite?

CAPTAIN KLEIMAN: That is right. And we ask

that the objections which had been taken with respect to that motion be considered as having been taken by every defendant, and that that motion should be applicable to all the defendants instead of the five in whose behalf the motion had been made. So, sir --

THE PRESIDENT: In our jurisdiction -- in the Australian jurisdiction -- I do not know of any such procedure. The defendants, or persons to be made parties to the matter, may come a few minutes before a formal application and consent to the formal order in the same terms as before the earlier order. Probably, this is the same.

CAPTAIN KLEIMAN: Yes. What we are trying to do is to expedite matters, not cause any repetition of motions.

MR. COMYNS CARR: Now, you did not read all of it, or attribute the number to the one that has been handed to me this morning which, I think, is the one which you have there. May we ask when that was filed?

CAPTAIN KLEIMAN: That was filed last night, about four-thirty or a quarter to five, sir.

CLERK OF THE COURT: I think that last one you mentioned I have not received, and it, therefore, has not been recorded with the number.

CAPTAIN KLEIMAN: Well, I filed that yesterday

at about four-thirty with the Secretariat's Office. I spoke to Colonel Hanley and Captain Schwartz. That was the motion I said was mimeographed.

LIEUTENANT COLONEL HANLEY: That was not to be discussed at this meeting.

CAPTAIN KLEIMAN: No, no! These two, if you recall.

May I show this motion? (Handing paper to Lieutenant Colonel Hanley)

This was the motion I said had been filed with Captain Schwartz, to be filed about four-fifteen. Then Captain Schwartz had them taken out to the mimeograph room. They were filed in stencil form -- this, and motion to extend the time for making motions were filed in stencil. They were taken up to the mimeograph room. We requested that the motions be mimeograph, and this is the first motion that was filed, as a matter of fact. I told you that they would be ready this morning. I think there were forty copies at your office right now. I thought they would be distributed among the --

LIEUTENANT COLONEL HANLEY: How about the original copy? Have you received that, Mr. Bowman?

CLERK OF THE COURT: No. This is a motion to dismiss the Indictment.

CAPTAIN KLEIMAN: Yes, on the grounds that it

does not contain essential facts constituting the offenses alleged.

CLERK OF THE COURT: There was one motion to dismiss and the plea to the jurisdiction filed by, I think, five of the defendants; and thereafter a motion was filed on behalf of all of them, and those who have been ruled on.

CAPTAIN KLEIMAN: That is right. This is a motion that goes formally to the substance. The other motion, wherein we moved to strike the counts, was based upon the fact that there was no international law under which any of these offenses could be considered a crime. This motion is based upon the grounds that it does not contain --

CLERK OF THE COURT: The facts.

CAPTAIN KLEIMAN: (continuing) the essential elements the offenses allege. It goes to form -- substantively to form, or formally to the substance of the crime. The other motion goes just to the question of that; there is no international law which makes any of the offenses a crime.

Sir, may I explain about this motion?

CAPTAIN FURNESS: I think the only question now is what motions have been filed? As this is so, couldn't we continue later?

CAPTAIN KLEIMAN: This is the motion, Mr. Comyns

Carr, if you recall, that I discussed with you about two days ago.

MR. COMYNS CARR: Yes, I heard it mentioned; but, as I had not seen it this morning, I wonder where it was filed.

CAPTAIN FURNESS: May I say that most of these were prepared by the new American counsel who have just come in, and, in many cases, I think that they should argue the motion rather than counsel here. They could come in now.

CAPTAIN KLEIMAN: This particular motion, sir, was prepared about four days ago, and it took us that length of time to get the signatures of the Japanese counsel on the stencil sheet. This is the motion that I discussed with Mr. Comyns Carr. The bill of particulars -- the information that we request in the bill of particulars -- is just information giving us the essential elements of each offense alleged. In discussion --

MR. JUSTICE MANSFIELD: This is going to the motion on it, if we give the order.

THE PRESIDENT: Let us find out what it is about.

MR. COMYNS CARR: I am only inquiring, preliminary to this morning's proceedings, what motions there are and in what order. Now it appears --

THE PRESIDENT: Here is an attempt to describe

this last thing, which has not been received by registry as far as the Clerk of the Court has been concerned.

MR. COMYNS CARR: I do not know, sir, whether you are satisfied that this was probably filed in time.

CLERK OF THE COURT: No sir, there is no record in the Secretariat office.

CAPTAIN KLEIMAN: It has not been filed.

THE PRESIDENT: Then you will have to apply for an extension of time.

CAPTAIN FURNESS: We have applied for one of the motions at the --

CAPTAIN KLEIMAN: That is the motion that has not been filed. Also, we have been advised by Mr. Nelson that the motion had been submitted in a stenciled form to Captain Schwartz, and Captain Schwartz took the motion up with the mimeograph room yesterday at four-fifteen.

COLONEL WALBRIDGE: There are only four motions that came in at five o'clock.

CAPTAIN KLEIMAN: Colonel Hanley knows about it. Then I discussed with you these motions; do you recall, sir?

LIEUTENANT COLONEL HANLEY: You mentioned it, but I have not seen it.

CAPTAIN KLEIMAN: Sir, may I tell about the motion that is supposed to be argued today? It is the

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CAPTAIN KLEIMAN: Sir, may I tell about the motion that is supposed to be argued today? It is the

motion on the bill of particulars, sir. And, may I explain to you what had occurred concerning the motion on the bill of particulars in order that you understand why we filed this particular motion?

THE PRESIDENT: I think I will let Mr. Carr tell me.

CAPTAIN KLEIMAN: All right. I appreciate that, sir.

MR. COMYNS CARR: Our view with regard to this motion, and with regard to all other motions which we have seen, is that there is no ground for them and that they should be dismissed. When we might have been prepared to supply the defendants with some further information which would have been of assistance to them is a matter entirely outside any question of their right to an order on a motion for bill of particulars merely to save time by enabling them to understand in advance more of the detail of our case. But, as far as this motion is concerned, our view is that there is no ground for it whatever; that the Indictment, as it stands, gives them all the information to which they are entitled, and, indeed, in certain respects, a great deal more than they are entitled to. But, we deliberately did that in order that they might have a further understanding of the lines of the case that was going to be presented against them than they would have

been able to have if we had adhered more formally to the rigid minima required for stating the offenses.

One takes it in detail as is shown on the original motion. They ask for the times when, the places where, and in what manner each of the above named defendants entered into the conspiracy alleged in the Indictment. Well, the Indictment charges the conspiracies as being between certain dates and places. In my submission, that is all the information they are entitled to as to the dates it alleges.

MR. JUSTICE MANSFIELD: The details of the motions.

MR. COMYNS CARR: Yes. They have then given us further details, which I do not think were filed but were given at our suggestion in the hope that they could get something more specific as to what they wanted to know, which we might have been able to allow them; but, there again, it does not ask for anything which they are entitled to, in my submission, nor anything which tells us -- draws our attention to any specific matter of fact which it might be convenient to inform them upon, even if they are not entitled to it. I do not know, but you probably have not a copy of the further details which they ascribed to it.

THE PRESIDENT: Suppose I should make an order for these further particulars?

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THE PRESIDENT: Suppose I should make an order for these further particulars?

MR. JUSTICE MANSFIELD: No, no your Honor. No.

MR. COMYNS CARR: We say there is no occasion for any order at all.

MR. JUSTICE MANSFIELD: No, your Honor. The point is that we are opposing the motion absolutely. They have given us these details for a motion of bill of particulars which was handed in last week, and they merely elaborate the general statement in the bill itself. We are opposing absolutely, because, we say that they have had all the particulars to which they are entitled.

THE PRESIDENT: In the Indictment itself?

MR. JUSTICE MANSFIELD: In the Indictment itself.

THE PRESIDENT: You have offered nothing further, sir?

MR. COMYNS CARR: Nothing further, sir. As part of the pre-trial, we were prepared to offer them anything.

MR. JUSTICE MANSFIELD: No, we were not prepared to offer them --

MR. COMYNS CARR: Part of the pre-trial conference, to the matters to which they are entitled, but not to matters of orders.

We ask the Tribunal to take judicial notice of certain facts. You will find that the facts listed there give them a great deal of further information, in

chronological order, as to the events which we say are the major events in this matter.

CAPTAIN FURNESS: Yes, but you ask that they take judicial notice, that it be taken as proved, which is far different than giving us notice as to how to prepare our case. They are not facts which you intend to prove, which we intend to disprove.

THE PRESIDENT: But they show what the prosecution relies upon.

MR. COMYNS CARR: They show the story --

MR. JUSTICE MANSFIELD: Show the story before the Court, and they give a number of documents, also, your Honor, which inform the defendants as to our contentions and the chronological lists as one, although we are asking that they be judicially recognized. They are matters which the defense believes. Because we are asking them to be judicially recognized, they form an essential part of the case and therefore give information to that extent.

THE PRESIDENT: Well, it may be that I should deal with that application to have these documents and events judicially noticed before I deal with the application for particulars.

MR. JUSTICE MANSFIELD: That may be. I suggest they be taken today.

CAPTAIN KLEIMAN: May I say something? I did

not think we were going into the discussion of the motion for bill of particulars now. As I recall, when I started to give the grounds for the motion for the bill of particulars, I was interrupted by Mr. Carr with the statement that it be best that we get together in a Chambers meeting because he might be able to supply us the information that we request.

MR. COMYNS CARR: No, no. On the contrary, I said that none of the information requested was information to which you were entitled or which we should be prepared to give, but that we might be prepared to give certain additional information in different form which would be of assistance to them as part of a pre-trial conference. Now that information -- in fact, the greater part of it -- is contained in this motion which we have filed.

MR. JUSTICE MANSFIELD: What actually happened was that I think I broke in and said we are not prepared to offer anything unless all the motions -- and they had been disposed of -- are now in and we are not prepared to offer anything because we say they are not entitled to anything.

CAPTAIN KLEIMAN: Then we met here in a Chambers meeting, and your Honor suggested that we and the prosecution meet and see if we can expedite these matters that we request by agreement.

THE PRESIDENT: I did not suggest. It was indicated by prosecution. As I said, I said I had suggested nothing to --

CAPTAIN KLEIMAN: But there was some sort of intimation there.

THE PRESIDENT: Do not forget, this is a criminal procedure, and you are at arm's length.

CAPTAIN KLEIMAN: Now, furthermore, I spoke to Mr. Comyns Carr outside the Chambers after the meeting and an arrangement was made --

MR. COMYNS CARR: No, no.

CAPTAIN KLEIMAN: (continuing) for committees of the defense and of prosecution to meet during the interval between the date of the last Chambers meeting and this meeting.

MR. COMYNS CARR: No. Really, I --

THE PRESIDENT: The idea was to see whether the prosecution would give you enough particulars to say that was the purpose of it.

CAPTAIN KLEIMAN: All right. I was -- excuse me.

MR. COMYNS CARR: I really must protest against this kind of thing. A private conversation between counsel is a matter which ought not to be the subject of discussion or argument before the Court. No arrangement was made whatever. All it said was, when they had filed all their motions,

there might be an occasion for the parties to meet and see if we could dispose of the matter as a whole. But, as they have not filed all their motions until the last moment, nothing has in fact been able to take place.

MR. JUSTICE MANSFIELD: We say they are not entitled to anything. We oppose all the motions and that was the motion. We were fighting it out on the basis of our being at arms length although we did not use that expression, but our contention was that they had all they were entitled to, and we were opposing every application by them.

THE PRESIDENT: I think you suggested you would be prepared to receive certain things, perhaps, and then the question arose whether that would satisfy the defense. I think that is what I gathered from it. Obviously, you had in mind further application making to the Court; about certain documents and events -- have us judicially notice those documents and events which may, in themselves, convey the required particulars. Now, we are going to deal with that application first.

CAPTAIN KLEIMAN: Sir, may I have just one statement, and I will not interrupt?

The grounds on which we base our motion for the bill of particulars, the requests of information that we make, is just information to cure the defects of the counts

and of the Indictment because neither the counts nor the Indictment state the essential elements of any offense alleged. Without such essential elements no count --

THE PRESIDENT: I do not agree with you for one minute; not according to the practice in courts as far as I am aware of it. You just simply said that on a certain date articles were stolen; you did not say what the elements of the stealing were -- taking without the consent of the party and with intent to deprive him of those things. You simply allege --

MR. JUSTICE MANSFIELD: The elements of the trial of stealing; you just say that he stole.

CAPTAIN KLEIMAN: May I read Stephens on "Criminal Law in England," sir?

THE PRESIDENT: Yes, although I must say I do not agree with him.

CAPTAIN KLEIMAN: Your Honor, may I read?

THE PRESIDENT: You may, yes.

MR. JUSTICE MANSFIELD: I suggest that the motion be taken.

THE PRESIDENT: We are wasting valuable time.

MR. JUSTICE MANSFIELD: I suggest that the motion be taken, either this motion of ours and the motion of particulars, but we request --

CAPTAIN KLEIMAN: We request at this time we

be permitted to argue the motion to dismiss the Indictment on the grounds that the Indictment preamble and the counts thereof fail to state the essential counts constituting all the elements of each offense alleged.

MR. JUSTICE MANSFIELD: That is just the same as the one dismissed; justifiable offense.

CAPTAIN KLEIMAN: No, sir. The motion that you refer to was made on the grounds that there is no international law.

THE PRESIDENT: What are you asking me to do at this moment? What motion is before me?

CAPTAIN KLEIMAN: The motion that is before you this morning --

THE PRESIDENT: Is for the particulars.

CAPTAIN KLEIMAN: (continuing) is for particulars.

THE PRESIDENT: What are you asking me?

CAPTAIN KLEIMAN: I am asking, and the particulars ask for information applying the essential elements of each offense alleged. I am asking that we be permitted to argue the motion to dismiss the Indictment on the grounds that the offenses alleged do not contain the essential elements of each such offense.

THE PRESIDENT: Well, if they did, it would be quite unnecessary -- if I understand you rightly, that is

not necessary.

MR. JUSTICE MANSFIELD: I suggest that your Honor should deal with motion filed by the prosecution. That is one that we can agree on as having been filed and being before the Court, and --

CAPTAIN KLEIMAN: Your Honor.

THE PRESIDENT: You can ask to take that motion.

MR. JUSTICE MANSFIELD: I request your Honor to take the motion of the prosecution now.

CAPTAIN FURNESS: We object at this time. It was not filed according to the rules. Defense did not receive one single copy which was filed. We have many defendants, many counsel. The only copy which should be considered was the one that was handed to us by the Secretariat. We object to its being handled in Chambers. We feel that all counsel for the accused should be present; that all accused should be present; the public should be present, so that it is a public trial; that it is essential that these matters, which are of fundamental importance, be handled publicly. We feel that many of the things which they request that the Court take judicial notice of, are controversial; that they are not common knowledge in any sense; that some accused may want them to be considered recognized by the weight of proof. Others will oppose; and it is entirely improper that this type of motion be handled

in Chambers. As you said, we are dealing at arm's length. I think, on this particular motion, we are strictly at arms length.

MR. JUSTICE MANSFIELD: May I point out, your Honor, I am sorry.

CAPTAIN FURNESS: And we feel also that the entire Court should be present and should rule on this and that, with all due respect, that is not within the province of the President to deal with this.

THE PRESIDENT: To decide questions of fact independently of the elements. I quite agree.

CAPTAIN KLEIMAN: We request all motions, including the bill of particulars, be discussed in open Courtroom.

MR. JUSTICE MANSFIELD: Well, your Honor, the amplification which is made by us in paragraph 1 is similar to a Chamber application made by the defendants asking for leave to make opening statements at the beginning of each defendant's case.

The second paragraph is that the prosecution be limited to produce certain documents at times from the Japanese government office, purporting to be records, without further authentication. That is, in formal matters when the document is produced, if the accused or any of the accused desire to controvert the facts contained in the

document or the fact that the document is an authentic one, they can do so.

CAPTAIN FURNESS: And I assume they can do so later, if it is found that there is a question as to the authenticity, of course -- confine that right to the prosecution. The defense, if the order is granted, would go on the same way.

MR. JUSTICE MANSFIELD: Exactly. There is no reason why the defense cannot.

CAPTAIN FURNESS: Those two are the meat of the motion.

MR. JUSTICE MANSFIELD: No, the next two: that the Court take judicial notice of the events on schedule "A." There are a number of events set out there. On some of them there may be no dispute. About others there may be dispute; they are events which are to be proved by the prosecution in the course of the case.

CAPTAIN FURNESS: You ask that they be assumed.

MR. JUSTICE MANSFIELD: We are asking that under the Charter, the Court may take judicial notice of facts of common knowledge --

CAPTAIN KLEIMAN: Yes, common knowledge.

MR. JUSTICE MANSFIELD: (continuing) facts of common knowledge; and we say that all these facts are facts of common knowledge. They do not raise any controversial

matter because they are facts of common knowledge in the history of the events in the Far East from the 18th of September, 1931 onwards.

CAPTAIN FURNESS: Our contention, sir, is that they are not of common knowledge and, in many cases, not facts.

MR. JUSTICE MANSFIELD: Well, the motion then is, your Honor, if none of these events can be taken judicial notice of, that that particular part of the Charter is entirely worthless. I will ask the defense if they can suggest one fact, which is a fact of common knowledge, which could be judicially noticed under the Charter. I presume one fact that they might suggest is that Japan is in the Far East. That would be carrying it to absurdity. One must go more into detail in order to take judicial notice of a fact which would be of some assistance to the Court in considering this matter.

CAPTAIN FURNESS: We agree that in many cases, here there are facts of which the Court can take judicial notice, but my statement was that many of these alleged happenings are neither facts nor common knowledge. Some are facts, probably, but are not common knowledge; and, unless they are common knowledge, they must be proved.

MR. JUSTICE MANSFIELD: That is quite so. That is the contention I have, no doubt, but --

matter because they are facts of common knowledge in the history of the events in the Far East from the 18th of September, 1931 onwards.

CAPTAIN FURNESS: Our contention, sir, is that they are not of common knowledge and, in many cases, not facts.

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CAPTAIN FURNESS: Furthermore, you must ask to take judicial notice of the Mukden Incident. We gather from what we have learned, or what we know from what common knowledge which we have, that that is the most complicated incident. We do not know how far that goes. What does it mean, to take judicial notice of the Mukden Incident?

MR. JUSTICE MANSFIELD: That the Mukden Incident, as it is commonly known, occurred on the 18th of September, 1931.

CAPTAIN FURNESS: I will ask the Court if they know what the Mukden Incident was?

THE PRESIDENT: I cannot speak for ten Judges.

MR. JUSTICE MANSFIELD: Naturally, the details would have to be proved. All we are asking is that the fact be established that the Mukden Incident took place on that particular date.

CAPTAIN FURNESS: If the details have to be proved, why do you not prove the incident?

MR. JUSTICE MANSFIELD: Because the details can be proved in their proper place in court.

THE PRESIDENT: There are lots of things Judges should judicially notice -- things that the Judges do not know.

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selves inasmuch as Article 9a of the Charter provides that the Indictment shall consist of a plain, concise, and adequate statement of each offense charged?

MR. JUSTICE MANSFIELD: The offense, yes.

CAPTAIN KLEIMAN: Before we take up these matters of judicial notice, which is a matter of evidence, should we not first concern ourselves with whether the Indictment complies with the requisites of Article 9a of the Charter?

MR. JUSTICE MANSFIELD: I am merely suggesting that this application be heard by the Court now. If the defense desires to object to its being heard here, I would like them to state their ideas.

CAPTAIN FURNESS: I am not stating my ideas.

MR. JUSTICE MANSFIELD: You are not going to object to its being granted?

CAPTAIN FURNESS: We are objecting to its being held in adjournment.

LIEUTENANT COLONEL WARREN: May I have something to say on that?

As has been pointed out by Captain Furness, this is a matter that we have not been able to study. I have been able to glance over the document lightly. It appears to me it asks the Court to take judicial notice.

MR. JUSTICE MANSFIELD: I am glad to get the

admission of defense.

LIEUTENANT COLONEL WARREN: I am assured that they would not, sir. I have the utmost confidence in their opinion, but, we would like an opportunity to present this at a later time and in open Court.

CAPTAIN FURNESS: I would like to say, on our part, that we do feel this --

MR. JUSTICE MANSFIELD: Are you implying that this motion be held in open Court?

THE PRESIDENT: Before all the Judges available?

CAPTAIN FURNESS: And with sufficient number of copies so that all the counsel for all the accused could study them.

MR. JUSTICE MANSFIELD: That is the duty of the Court: to supply those copies.

CAPTAIN FURNESS: Is it the duty of the Court? We always felt that we had to cut the stencil and provide for it as you can --

MR. JUSTICE MANSFIELD: We cut the stencil; that is as you can see.

CAPTAIN FURNESS: The motion that we have is simply typed. The exhibit or schedule is mimeographed.

MR. JUSTICE MANSFIELD: Yes.

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CAPTAIN KLEIMAN: What we are asking for is that these motions be taken in the order of any trial here, or

in any country, and in the order suggested by Article 15 of the Charter under which we are operating. We take up the pleadings first, before we take up matters that concern evidence.

MR. JUSTICE MANSFIELD: I do not quite understand what their argument is. They are talking about pleadings. I am inclined to the theory that the application be held now. Captain Furness wants it to be held in Court before all the Judges.

CAPTAIN FURNESS: Before all the Judges at a later date, and with sufficient copies supplied to the defense.

MR. JUSTICE MANSFIELD: I ask that it be heard now. All the requirements of the rules have been complied with. The application is properly before the Court in Chambers, and we are in a position to go ahead with it. I ask that there be no delay.

CAPTAIN FURNESS: May I ask how counsel justifies it being heard in Chambers?

MR. JUSTICE MANSFIELD: Because all motions may be heard by the Court, and the Court may hear it in Chambers if it so considers fit.

CAPTAIN FURNESS: The Court is not the President.

MR. JUSTICE MANSFIELD: No. But, when motions are filed, and they come before the Court and the Court is in

Chambers, it naturally will be taken in Chambers.

THE PRESIDENT: Do you want all the Judges present?

CAPTAIN FURNESS: Yes.

MR. JUSTICE MANSFIELD: I object, your Honor. If it is heard in open court, it will cause delay after delay.

THE PRESIDENT: I think I will refer the matter back to my colleagues. I have not got the fullest authority to act in their behalf. I am here to discover how far the parties are prepared to meet each other's suggestions; I will put it that way.

CAPTAIN FURNESS: I do want to say, I think this motion is of fundamental importance in this trial.

MR. JUSTICE MANSFIELD: You mean 3 and 4?

CAPTAIN FURNESS: Yes. And, therefore, it is improper to handle it in Chambers and not handle it before the full court.

THE PRESIDENT: There was no opposition to the matter being referred to Chambers; no party objected, so a different result may have been obtained.

CAPTAIN FURNESS: We had no opportunity to object to this motion being handled in Chambers.

MR. JUSTICE MANSFIELD: The earlier matter was adjourned to Chambers.

MR. COMYNS CARR: The bill of particulars.

CAPTAIN FURNESS: That, as I understand it, is the only matter to which objection was not raised as to its being handled in Chambers. The rest of these motions have not yet been considered and not yet referred to Chambers.

MR. JUSTICE MANSFIELD: Possibly, your Honor, with regard to this motion there are 1,2,3 -- there are 3 formal -- well, not matters of substance in it which might possibly be dealt with, matters of procedure --

CAPTAIN FURNESS: That is right.

MR. JUSTICE MANSFIELD: Matters of procedure.

CAPTAIN FURNESS: Paragraphs 1, 2 and 5.

CAPTAIN KLEIMAN: I, on behalf of the defendant HIRANUMA, have not seen the motion discussed, and in his behalf we request that we be given an opportunity to study the provisions of that motion -- given an opportunity to study the law concerning these proceedings, and I object at this time to that motion being discussed now.

MR. JUSTICE MANSFIELD: What adjournment are you asking for?

CAPTAIN KLEIMAN: I am asking for a period of three days in order to study the motion, in order to study the law applicable with respect to his motion, and I say that discussion of that motion is out of order, contrary

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to the provisions of this Charter, and contrary to the law as is known throughout the world. In general, I ask that the motion to dismiss the Indictment on the grounds that the essential elements are not contained in any offense alleged be entertained before we discuss matters of judicial notice, which are matters of evidence.

THE PRESIDENT: Well, I should have to refer this back to my colleagues who very likely will take it to Court, but it will take this to see that their time has been wasted.

MR. JUSTICE MANSFIELD: I would suggest, your Honor, that these matters with regard to presenting separate phases of the case be reserved to the making of the opening statement. The defense asked for similar ones. I do not know whether you have any objection to our motion.

CAPTAIN FURNESS: I can speak personally that I have not.

MR. JUSTICE MANSFIELD: It is more a matter of procedure than anything else.

CAPTAIN FURNESS: I would suggest that, if you could get complete copies, we could distribute them to all counsel for all accused; and, if that is done, then there would be no objection, and the Court's time would not be wasted by arguing on one procedure.

MR. JUSTICE MANSFIELD: Fine. Copies are available now.

CAPTAIN FURNESS: If you could get us those in time so that we can speak upon all those matters --

MR. JUSTICE MANSFIELD: We will try to see that you get it this morning.

CAPTAIN KLEIMAN: Your Honor, inasmuch as the date had been set, June 3rd, for the trial, on behalf of the five defendants for whom motion for bill of particulars has been made, and in behalf of all the defendants for whom motion to dismiss the Indictment has been made, I feel that I cannot, and it is impossible for me to prepare a defense, prepare for trial in this case unless the date, the place, how the defendant was connected with any offense alleged, whether a specific rule of law was violated by him, and the essential elements of the offenses alleged wherein each defendant is charged, are furnished.

I have not yet been able to discuss any phase of the Indictment with defendant HIRANUMA because, in my estimation and in the estimation of all the counsel who are here and in the estimation of all the Japanese counsel, nothing in the Indictment states any offense, nothing in the Indictment gives any of the essential elements of the offense.

The time is getting short. I ask for motion

to dismiss to be argued before the Court today, if possible; if not, on Monday morning. The same grounds that I will make for motion for bill of particulars will be the grounds for motion to dismiss the Indictment. By the motion for bill of particulars we are trying to cure the defects in the pleadings. If everything is approved --

MR. JUSTICE MANSFIELD: This is argument.

This has nothing to do with our application.

CAPTAIN KLEIMAN: If everything is approved --

MR. JUSTICE MANSFIELD: Just one moment, please. I object to it, your Honor.

THE PRESIDENT: I would like to hear what he has to say.

MR. JUSTICE MANSFIELD: It has nothing to do --

THE PRESIDENT: Yes. I have to advise my colleagues. The Court has to protect itself against prejudice at this time, and it shall take the necessary measures to do so, I assure you. Waste of time by the prosecution or by the defense --

MR. COMYNS CARR: May I suggest that the motion for bill of particulars is properly before you in Chambers? It was so ordered without opposition, and --

THE PRESIDENT: But not all the Judges are present. I understand --

MR. COMYNS CARR: It is too late to alter that

now. That was done without opposition; it was ordered into Chambers; and, even if you should decide that you will not take any of the other motions today in view of what has been said, that is no reason why you should not dispose of this motion for application of bill of particulars.

THE PRESIDENT: I think it might be better to have this matter determined publicly and let the public see how we dispose of these applications.

MR. COMYNS CARR: There was that distinction between that one and the other, if you saw fit to deal with it.

MR. JUSTICE MANSFIELD: It was for the purpose of expediting the matter that the Court suggested that it be referred to Chambers. Your Honor will know that the unavoidable delay which occurred when it --

THE PRESIDENT: On account of the attitude of the last counsel for the accused who spoke, I think it might be just as well to have this matter brought into court so that the public might know what they ask and how we dispose of it.

MR. JUSTICE MANSFIELD: Your Honor has the power to refer the matter back to the Court, if your Honor feels fit to do so.

CAPTAIN FURNESS: We want you to know this: when

the Court ordered it to Chambers, there was no objection. We do not wish to have it appear in any way that we are objecting now, though, to particular motion heard in Chambers.

THE PRESIDENT: The public should know that not only the offense be stated in the Indictment, but the evidence of it. I would like the world to know that that application is made and how the Court deals with it -- what they think of it. I think a lot of time is going to be wasted.

MR. JUSTICE MANSFIELD: I think the defense is not in agreement because Captain Furness has said he has no objection to this motion of particulars being dealt with in Chambers.

THE PRESIDENT: Captain Furness is only one counsel.

CAPTAIN FURNESS: I speak for others.

LIEUTENANT COLONEL WARREN: I agree with that. All counsel are agreed except Captain Kleiman. I have no objection to having it heard in Chambers.

CAPTAIN KLEIMAN: If you feel that way, then I feel the same way, your Honor. I feel the same way as the rest of the American counsel.

THE PRESIDENT: Well now, what is your attitude? Are you still insisting that the Indictment should contain

the elements of the offense as well as the offense itself?

CAPTAIN KLEIMAN: Sir, may I make myself clear?

THE PRESIDENT: Are you insisting that we hear your application first?

CAPTAIN KLEIMAN: In the motion for the bill of particulars, as I pointed out before, your Honor, I am requesting the date, the place of the crime, the manner in which the defendant is connected with the crime alleged, and the specific rule of law that has been violated that makes his act a crime. By those, I mean the essential elements of the crime. Perhaps, if I read one section of Stephen on "Criminal Law in England" --

THE PRESIDENT: Yes, do. By the way, our Queen Annes Code is based on his report; I am glad you mentioned it. I have some familiarity with it.

CAPTAIN KLEIMAN: Stephen states that "an indictment must consist of a venue, the statement, and a conclusion. Venue must be alleged to show that the court has placed jurisdiction over the offense, and over the persons accused."

MR. JUSTICE MANSFIELD: That is where the jurisdiction is territorial.

MR. COMYNS CARR: Why is it not stated in the Indictment?

CAPTAIN KLEIMAN: I will leave that alone.

Then I go next to the statement in the Indictment, and I refer to Article 9 in our own Charter that says "The Indictment shall consist of a plain, concise and adequate statement of each offense" alleged. What do we mean here? What does the Charter mean by "adequate"?

Stephen says, "The function of a statement is to set out all the ingredients of the offense with which the defendant is charged, namely, the facts, circumstances, and intent which constitute the offense. These matters must be set forth with certainty and without repugnancy, and the defendant must be directly and positively charged with having committed the offense. At common law every material fact, that is, every effect of fact which forms an agreement in the offense has to be alleged to be done at a particular time, and place; all the facts and the intent constituting the effects, must be stated with certainty."

THE PRESIDENT: Well, of course--

CAPTAIN KLEIMAN: Wait. May I just read, sir?

THE PRESIDENT: You forget that Stephen is trying to improve on the common law and did. The common law indictment is a terrible thing. It has been dispensed with throughout the entire British Empire, as far as I know.

CAPTAIN KLEIMAN: May I read?

THE PRESIDENT: Here we are not going back to that mess of technicalities which disgraced the common law of England and which has been remedied largely by statute. Here we are to give the accused a fair trial and without waste of time -- a fair trial. It does not follow that we have to take all those technicalities, and take all those meticulously worked out things that apply in national courts. Why, the rules of evidence do not apply here.

CAPTAIN KLEIMAN: That is right, sir. Those are procedural, but an element constituting --

THE PRESIDENT: You overlook that you think this is to be dealt with on the same footing as a trial of nationals. In the strictest sense, that is not so. We are going to abide by the Charter.

CAPTAIN KLEIMAN: Well, sir, the Charter says, adequately states -- and the element of a crime, the time when the crime took place, the place where it took place, how the defendant is connected with the crime, what rule or law makes it a crime, those go to the substance of the offense. They are no procedural-like rules of evidence.

THE PRESIDENT: You are going to make it harder to convict these accused than it would to convict nationals if they were in the dock. You want all those technicalities

observed.

MR. JUSTICE MANSFIELD: It depends entirely upon the structural statement of the offense charged; not of the ingredients of the offense, not of the facts constituting the offense, but of the offense, and, provided they are not filed clearly, of the offense which they charged and the provisions of the Charter as carried out.

CAPTAIN KLEIMAN: Sir, that language is the same language as is used in the rules of federal criminal procedure in the federal courts of the United States. There it says the indictment shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged -- adequate statement.

THE PRESIDENT: You are wasting time in pointing it out to me -- what Stephen said about the common law, because I know what he said.

CAPTAIN KLEIMAN: May I give another statement with respect to law in the United States and England, sir? May I just read this, and I will ask no more?

THE PRESIDENT: I think you had better confine your attention to the Charter.

CAPTAIN KLEIMAN: Just to point out what is the meaning of the term "adequate" which defense states in Article 9a of the Charter, may I read what is held to be affirmance of the law in America and the common law in

the British Isles? Just this statement, sir.

THE PRESIDENT: Yes.

CAPTAIN KLEIMAN: "In order properly to inform the accused of the 'nature and cause of the accusation,' within the meaning of the Constitution," (and this is my own) 5th Amendment, 14th Amendment, 6th Amendment of the United States Constitution and provisions of the Magna Charta, -- (this is not my own) "and of the rules of the common law, not only must all the elements of the offense be stated in the indictment, but they must also be stated with clearness and certainty, and with a sufficient degree of particularity, to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty and perhaps his life are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged

offense."

Furthermore, may I say this --

THE PRESIDENT: You are reading all that into the Charter.

CAPTAIN KLEIMAN: Sir, just one statement as to the function of the indictment and that is this: We want the offense to be so alleged in the indictment that if the man is convicted he will not again be tried for the same offense, so that he will not be surprised by proof as presented against him, so that he and his counsel can know the issues raised by the charges in compliance with provisions of Article 12a and 12b of the Charter, which talks about issues had. We say that no offense is charged by any act or preamble of the Indictment and it can not be the basis of any issue.

THE PRESIDENT: You have got the wrong idea of the nature of this trial, entirely wrong.

MR. JUSTICE MANSFIELD: I point out to your Honor, that the statement he read requires the elements of the offense to be charged.

CAPTAIN KLEIMAN: By "elements," when the crime took place, where it took place, how it took place, how the defendant is connected with the crime, and on what law. Just tell us the specific law that makes his specific act a crime.

MR. COMYNS CARR: Well, 12a, to which Captain Kleiman refers, is designed to prevent any act which caused unreasonable delay and rule out any issues and statements of any kind whatsoever.

CAPTAIN KLEIMAN: That is exactly what we are requesting in this Indictment. We say strike out all the appendices. We want a simple allegation of the crimes charged, and appendices confuse me; they confuse the defendant, whom I represent, and they confuse every American counsel with whom I have discussed the matter.

CAPTAIN FURNESS: I do not want to express my opinion that I want all the offenses struck out. There are some that I want to be made more clearly, of offenses, of assurances, without any statement of source, or circumstance, or authority. I want to know who made those assurances, why they were made, what connection they had. Certainly, I do not want all the appendices struck out.

MR. JUSTICE MANSFIELD: Is it possible, your Honor, to make any arrangement with the defendants, because they do not agree amongst themselves? An arrangement made with one may not be binding on another; so, naturally --

MR. COMYNS CARR: Make an order one way or the other on the motion, sir.

CAPTAIN FURNESS: It has not been argued in detail, and we feel we are entitled to more information.

I do not see how it can be decided on this early.

THE PRESIDENT: Well, are you supporting the application?

CAPTAIN FURNESS: I am supporting the application but there are general statements which I cannot support -- the application which requires striking out all appendices. I certainly do not know -- I do not want to assume that I want them all struck out.

CAPTAIN KLEIMAN: I, on behalf of the defendant HIRANUMA, will make a motion at a later date to strike out the appendices; anything contained therein that does not connect the defendant HIRANUMA with the offenses alleged against him in each of the counts, on the grounds that such statements are a matter of surplusage, are irrelevant, and on the grounds that they tend to confuse issues in this case.

MR. JUSTICE MANSFIELD: I was under the impression, your Honor, that yesterday had been fixed for the last day. Now we have notice of another --

THE PRESIDENT: May 25th.

CAPTAIN KLEIMAN: Friday, May 25th.

THE PRESIDENT: Saturday, the 25th. We were thinking of Empire Day.

MR. COMYNS CARR: I do not know if you have heard everything to be said in support of this motion for

particulars. I hope so, because we must reach finality at the same time.

CAPTAIN KLEIMAN: Sir, may I say this in order to show you what I want with respect to particulars? May I go through at least one count with the Court?

THE PRESIDENT: I think you would be of more assistance if you did that.

CAPTAIN KLEIMAN: Yes, sir.

THE PRESIDENT: You want to induce me to make this trial more technical than a trial in a national court.

CAPTAIN KLEIMAN: Count 1 in the Indictment alleges that "all the defendants together, with divers other persons, participated in the formulation or execution of a conspiracy the object of which was, among other things, the domination of East Asia."

We would like to know when this conspiracy was formulated.

MR. JUSTICE MANSFIELD: The 1st of January, 1928, and 2nd of September, 1925.

CAPTAIN KLEIMAN: That is right. That was seventeen years ago. I have got to prepare for the defense of the defendant HIRANUMA, and I say that that date is not specific enough because nowhere in the Appendices is HIRANUMA mentioned except in --

THE PRESIDENT: Suppose the offense were joined in from time to time, over seventeen years, by additional offenders; how else would you express it?

CAPTAIN KLEIMAN: The defendant HIRANUMA --

THE PRESIDENT: I suppose that would be the allegation; I do not know. You have got to consider the nature of the allegation.

CAPTAIN KLEIMAN: Then here, in a formulation or execution, that is conjunctive pleading; that is defective pleading. We do not know what the charge is there. Did they conspire in formulating --

THE PRESIDENT: In going over a long period, it may be, in the case of some, formulation; in the case of others, execution.

CAPTAIN KLEIMAN: I wish to know.

THE PRESIDENT: It may be formulated in the first five years, and executed in the following twelve.

CAPTAIN KLEIMAN: Well, sir, with respect to a particular defendant -- HIRANUMA -- are we not entitled to know whether he conspired in the formulation --

THE PRESIDENT: It is alleged that he did.

CAPTAIN KLEIMAN: (continuing) and that he conspired in the execution?

THE PRESIDENT: They are not bound to disclose their evidence.

CAPTAIN KLEIMAN: I thought that goes to the nature of the offense. Then the Indictment: To give us further information, we are looking for the place where they conspired, if the Court feels that that should be furnished to us. Sir, would it be imposing upon your Honor, if I read the common law definition of "conspiracy"?

THE PRESIDENT: Do not. The definition is in the law.

CAPTAIN KLEIMAN: All right, sir. May I ask this: do you feel that we are entitled to know where they formulated this conspiracy?

MR. JUSTICE MANSFIELD: Your Honor, the jurisdiction is not territorial as it is in national courts.

CAPTAIN KLEIMAN: Are we entitled to know in what manner the defendant was connected with this formulation or execution of the conspiracy?

THE PRESIDENT: You are not. I have never known it to allege in what way, particularly, since the defendant was associated with the conspiracy.

CAPTAIN KLEIMAN: Are we entitled to know, sir, whether the defendant acted with a criminal intent, with an intent to violate law, when he joined this conspiracy? Sir, it does not allege here, feloniously, unlawfully -- criminal intent, or any manner to show criminal intent.

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MR. JUSTICE MANSFIELD: It is just that the

object was to wage declared or undeclared wars of aggression.

CAPTAIN KLEIMAN: Nor did he join with criminal intent.

THE PRESIDENT: It is alleged that he did.

CAPTAIN KLEIMAN: I think an order -- all right, look: we want to find out what the offense is that say, for example, the defendant HIRANUMA is charged, and the count 1 refers us to the whole of particulars in Appendix A. Mind you, here the object of the conspiracy is the domination of East Asia, and the Pacific and Indian Oceans. Appendix A contains ten sections; count 1 charges each of the defendants with individual guilt. Nowhere in any of the sections is the name of any defendant mentioned with the exception of page --

THE PRESIDENT: All except they name a few of them, do they not?

CAPTAIN KLEIMAN: There is just one exception here, where the defendant MATSUOKA is mentioned. That has nothing to do with the crime alleged in count 1. I say that the German government advised the defendant MATSUOKA that they were preparing for war against Soviet Russia. Now, with respect to that admission with the defendant MATSUOKA, what has that to do with this conspiracy, the object of which was to dominate East Asia?

"We go back to section 1, and all of these sections; Japan is alleged to have committed the various acts, not the defendants.

MR. JUSTICE MANSFIELD: If you look at Appendix A, you will see the charge does not specify that.

CAPTAIN KLEIMAN: Well, we talk about section 1 of Appendix --

MR. JUSTICE MANSFIELD: "E, E."

MR. COMYNS CARR: Appendix E is the one which deals with the position of individual defendants; Appendix A deals with the story as a whole, against them all.

THE PRESIDENT: I find no difficulty in following it.

CAPTAIN KLEIMAN: How each defendant was connected with the events related, sir. You see, we are concerned -- each counsel is concerned with his particular defendant.

THE PRESIDENT: I know.

CAPTAIN KLEIMAN: And if we could just find in these appendices just how the defendant is connected up -- that is what we are asking for. How is the defendant connected? If you feel the other elements will not follow the rule of essential elements of the crime, we will follow you, sir. But, then, we would like to know, in order to prepare for defense, just how the defendant is

connected with the crimes in the various counts. How is he connected with the events related in Appendix A,E,C? Otherwise, we do not know what accusation against the particular defendant whom we represent is? There are many conclusions contained in these appendices.

THE PRESIDENT: Just what do you want to know, whether he is connected as a principle or an agent?

CAPTAIN KLEIMAN: In any manner, we would like to know just exactly what is the particular accusation against the particular defendant in the counts wherein he is charged.

THE PRESIDENT: Well, I have never known it to be set out in an indictment, or I have never known particulars to be given.

CAPTAIN KLEIMAN: Sir, in the ordinary indictment that I know of, there is an allegation of conspiracy. They will say, "The defendant Jones with the defendant Wilson and Harrison, with an unlawful intent to defraud the Government of the United States, did conspire at a certain place." But, if you feel that the elements are necessary to be given in the offense, then we are asking that in these events that are related to the count, to give -- now here, these ten sections: they were sections mentioned here that have nothing to do with the object of conspiracy as related in count 1.

They deal with discussions with Germany and Italy, aggression against the Soviet Union --

MR. COMYNS CARR: We think otherwise. We think they all have to do with it.

CAPTAIN FURNESS: I would like to make one specific request for certain particulars, which I feel in my own mind we are entirely entitled to. It deals with Appendix C of the Indictment: "Assurances."

I have here a copy of paragraph 1 of this motion, and I address myself specifically to that and nothing else -- true copy in English and Japanese of each official instance referred to in Appendix C of the Indictment: By whom and under what authority it was made, in what capacity each person or persons acted in making it, in what form it was made, to whom it was made, upon what occasion and under what circumstances it was made I make that application, because, in the Indictment and in the Appendix, it just sets out a series of statements of which we do not know the source, the authority, the capacity; we do not know what they mean -- in other words, how official they were; and we feel we are definitely entitled to that and request, at least in dealing with this motion, that the Court order that those things be done.

CAPTAIN KLEIMAN: Sir, that is the basis of our entire motion. We are asking when, where and how.

CAPTAIN FURNESS: I want to say I will confine myself to this. I am not dealing with the entire motion. This is relative to the entire subject discussed so far, and I do so for myself and some other counsel request that the Court order at least that part of the motion.

MR. COMYNS CARR: Well, sir, dealing with the motion, generally, in my submission, this motion is an example of the old adage, that if you give certain people an inch they will take a foot or seek to do so.

It would have been perfectly proper and perfectly correct to have confined this Indictment entirely to a series of charges following the words of the Charter -- that portions of paragraph 5 of the Charter -- without any addition whatever. We thought after, if I might say so, considerable discussion, that it was desirable to give them more information than that, and we, therefore -- for instance in count 1 in which specific reference has been made -- put in a description of the purpose with which the conspiracy to wage wars of aggression, and so on, was entered into which, strictly speaking, it was not necessary for us to put in; but we thought it fair to give them an idea of the case we were going to make on that. We also, for the same reason, added these various appendices, most of which, in my submission, we could not have been ordered to add as a matter of particulars; but we did it in order

to give both to the Court and to the defendants an advance indication of the general nature of the case which we were going to make.

Now comes this application for all sorts of additional particulars: the time, when, how. In a conspiracy, for instance, it is neither ordinary practice in any country of which I am aware, nor is it possible as a matter of common sense, to do more than name the beginning and end of the period in which the conspiracy took place, which includes the original formulation of it and the progress of it, both in addition as to its formulation and in its execution, and in naming a number of conspirators. It is sufficient, within a period named in the Indictment, if it is proved that some of them were parties to it in the very beginning, others joined it later, some dropped out at later stages, others remained parties to it to the end. All that, in my submission, has always been held to be capable of proof within an allegation, simply naming the beginning and the end of the period.

With regard to place in national systems of law it is usual to have to name some place in order to establish the venue for the purpose of jurisdiction of the court. That is totally unnecessary for the purpose of this International Tribunal.

In cases of conspiracy, even in complying formally with the national rule, in national tribunals, it is only formal because a conspiracy, by its nature, is very seldom confined to one place, and it is always held to be sufficient to name one place within the jurisdiction under which you can prove a conspiracy which in fact extended over a vast number of other places, some of them within and some of them without the jurisdiction of the Court as long as part of it comes within the jurisdiction of the Court.

All of that is unnecessary, as far as formulation, before an International Tribunal, and it is possible, as a matter of fact, to name all the places in which the formulation of a conspiracy, which has covered half the globe, and in one of its elements the whole of the globe, took place.

Therefore, in my submission, there is no ground for any order of that kind.

And then, when you come to the manner in which each of the defendants entered into the conspiracy, I never heard in all my experience, nor have I been informed by any of my colleagues practicing in other jurisdictions, of any requirement that you should indicate in a conspiracy charge the manner in which the conspiracy was entered into by each defendant. The normal experience of such cases is

that you cannot, even in the end, produce evidence as to that. The conspiracy is to be inferred from a number of acts committed at different stages in the course of it by the various defendants. It is very seldom that you have direct evidence of people meeting in a dark room and actually coming to the decision to enter into the conspiracy.

Then, there was reference made to the use of the alternative, the particle "or" in some of the counts of this Indictment, whereas, in some of our jurisdictions it is more usual to use the particle, "and." That was deliberately decided upon by us for the reason that that practice of using "and" when you mean "and/or" -- let us see when you intend to include the word "and/or" under the same word. Although, for certain technical reasons, it has been adopted in some of the Anglo-Saxon jurisdictions, it is to many other people extremely confusing, and so we came to the conclusion that we were not bound by any technical rules of pleading, or in any one jurisdiction that it would be less confusing if we said what is really meant, or rather than say "and/or" in order to comply with the technical rule of a particular jurisdiction -- the jurisdiction of a particular country. I think that really, with respect, disposes of all arguments that have been put forward in support of this application in general

by Captain Kleiman.

CAPTAIN KLEIMAN: That is just one point, sir.

MR. COMYNS CARR: Yes, but it is taken as an example.

CAPTAIN KLEIMAN: May I point out, sir -- may I just point out counts 53 to 55, sir. I was interrupted, sir.

THE PRESIDENT: I do not think that is so.

CAPTAIN KLEIMAN: May I just -- here, under counts 53, 54, and 55. In the same count different defendants are charged with a crime against different places.

THE PRESIDENT: In reply to Mr. Carr, you may refer to it.

CAPTAIN KLEIMAN: All right; I am sorry, sir.

MR. COMYNS CARR: Generally, the other thing I wanted to say about Captain Furness' respective applications is of my "Assurances." In my submission, that is a matter of evidence. It is a matter to state what the assurances were which we allege were broken. How we establish that will be given as a matter of evidence -- will be produced in due course, and there is no occasion for making an order that it should be produced at this stage.

In general, the argument which we have heard from Captain Kleiman, which we have answered, is the same

with regard to all the acts. I do not say it would not need modifying or adopting as applied to one act or another, but in principle it is the same, and the demands with regard to each count are in principle the same. In my submission, the truth of the matter is that we have already given a great deal more particulars than they are entitled to, strictly speaking, and perhaps what has occurred is a warning that on another occasion one should not be so generous.

CAPTAIN FURNESS: Since that be shown to be official, rather than just isolated statements about authority which makes them official -- and I stress that because it seems to be the most obvious and also the part which has the most chance of success in this motion.

CAPTAIN KLEIMAN: May I say something, sir?

THE PRESIDENT: Yes.

CAPTAIN KLEIMAN: I started off at the beginning of the discussion as saying, what we are asking for in this motion for a bill of particulars is information that would show each defendant -- just what crimes he is charged with having committed. And we ask that each question -- when the crime was committed, if you say we are not entitled to the place where, we will omit that.

How he is connected with each particular crime:
Now, various of these crimes allege a conspiracy to

commit a crime, then planned and prepared for the commission of a crime, then initiated the crime, then waged the war. Is not one merged into the other?

Then, the thing that confused me in some of the counts and other attorneys with whom I discussed it -- you take a count like 52, or 54, or 55: they allege a crime against two separate men, and two separate groups of defendants are mentioned in the same count. Now, in our American practice, no one count may contain more than one offense. Each count must state the particular rule of war that is violated. Now I notice that in count 37, you acted in accordance with our American rules, and you stated that hostilities were unlawful because they are a breach of treaty article 5. Then in count 38, you gave the same facts contained in count 37. You made it a separate crime because you say they were in violation of other international rules of war.

What I ask, in connection with all the counts, that a specific international rule of law, or treaty, or convention, or assurance, be mentioned in each count to show just which particular treaty, convention, or assurance provision made that particular alleged offense a crime.

THE PRESIDENT: Is that all the argument? Am I in a position to give my position? I have heard everything.

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THE PRESIDENT: Is that all the argument? Am I in a position to give my position? I have heard everything.

The application is dismissed. I think that the Indictment and the Appendices thereto set out sufficient particulars. We must keep in mind that this is a trial by an international military tribunal, under a charter. It is not a trial at common law involved in all the technicalities which characterize the old common law trials. It is not even a trial in a national court where, perhaps, some regard would have to be paid to technicalities. I might say, however, that even if this were a trial in a national court, I am unable to see, on the argument, that the Indictment is in any particular deficient.

Captain Kleiman has asked that the particular section in the breach should be disclosed, but that never appears in any indictment, nor in any particulars ordered after an indictment. We are all supposed to know the law. I do not know that international law is any different from that. I do not think it is necessary to allege in the Indictment that, say for example, Article 63 of the Prisoners and Convention Act of 1929 was broken by a certain accused, at a certain time, at a certain place. We are dealing with the absence or the alleged absence from the Indictment and Appendices of the part played by the accused. There again, for example, in an allegation of conspiracy,

it is never disclosed in the Indictment what part the accused played, whether it is a principle or an agent, or what was the capacity.

Even in a national court, the Indictment would not be deficient because it does not particularize the manner in which the particular accused acted, or the parts they played. Then again, is it the absence of any indication as to the locality of the offenses? We must remember that type of crime alleged. On the very face of the Indictment, whole oceans and continents are involved, if not the whole globe, as Mr. Comyns Carr suggested.

In all the circumstances I can not see that, even if the test were what would be done in a national court, this Indictment is lacking in any particular which should be disclosed. For that reason, I dismiss the application.

As to the application of certain events and documents judicially noticed, I must defer that to my colleagues. I can see great substance in the contention of the learned counsel of the accused that that is a matter of fact-finding of the greatest importance and that perhaps it would be dealt with in court by all the Judges available.

As I understand it, the courtroom will not be

ready to sit until next week. However, we may be able to fit in here -- I do not know -- by some arrangement among the parties.

MR. JUSTICE MANSFIELD: The courtroom?

THE PRESIDENT: The courtroom. The courtroom itself will not be available until next week, because they are putting in IBM machines.

I see great substance, in the argument of counsel for the defense, that that is a matter which should be dealt with in open court, unless parties agree otherwise. It is the most important function of this Tribunal to find the facts, and it may be that some of these matters alleged to be the subject of judicial notice are not so.

I would not care to say that the whole of those ninety-five items are matters which should be judicially noticed. Perhaps the prosecution may have some difficulty in that regard. However, I will not give a decision on that. I will adjourn that for further consideration.

MR. COMYNS CARR: With regard to that particular one, sir, may I suggest that it would shorten the proceedings very considerably if the defense were ordered to give us notice, at some time before the matter is to be heard, which of the various items they agree should be matters of judicial notice. Then we should only have to be prepared with arguments with respect to those not agreed.

We find that would be convenient for the court and all parties.

THE PRESIDENT: Well, that is a matter between you and the defense.

MR. COMYNS CARR: (continuing) in fixing for the argument, to make an order fixing a date before which we should be told what is really the subject of argument.

CAPTAIN FURNESS: This is your motion this time?

MR. COMYNS CARR: Yes, I appreciate that. But, I can imagine an appalling waste of time if, in open court, we are going to have to go through item by item, and then, after we have started explaining why we think it should be, the defense says, "yes, we agree to that one." If we are told, in advance, which parts of the motion are disputed and which are not, it will enormously save the time of the court.

MR. JUSTICE MANSFIELD: The court will probably ask the defense now, at the hearing.

THE PRESIDENT: What does the defense think: I am never going to make any suggestions?

MR. COMYNS CARR: We will have to try and see between ourselves.

CAPTAIN FURNESS: We will try it out.

THE PRESIDENT: There are other motions at which the time will be fixed later.

MR. JUSTICE MANSFIELD: Some time next week?

THE PRESIDENT: Yes, They will be taken next week. All these motions will be taken next week, early in the week, I hope.

CAPTAIN FURNESS: Tell them to supply several copies, as usually required, and we will be able to get a copy.

(Whereupon at 1130, the proceedings were concluded.)

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